STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT CATHEY-BEY,

Defendant-Appellant.

UNPUBLISHED
September 18, 2003

No. 240374
Wayne Circuit Court
LC No. 00-012493

Before: Owens, P.J., and Griffin and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of possession of less than 50 grams of a controlled substance (heroin and cocaine), MCL 333.7403(2)(a)(iv); one count of carrying a concealed weapon (CCW), MCL 750.227; one count of felon in possession of a firearm, MCL 750.224f; and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to serve concurrent prison terms of two to fifteen years for the possession of a controlled substance, felon in possession, and CCW convictions. Defendant was also sentenced to a consecutive term of two years' imprisonment for the felony-firearm conviction. We affirm, but remand for the correction of defendant's judgment of sentence.

Defendant argues that the instructions given to the jury on the felony-firearm and felon in possession of a firearm charges were erroneous because the judge failed to provide a statutory definition of firearm. We review jury instructions as a whole to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.* The instructions must include all elements of the crime charged and must not exclude material issues, defenses, and theories for which there is evidence in support. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

Here, there was no evidence suggesting that the purported firearm was not, in fact, a firearm. Indeed, defendant merely argued that the police witnesses mistakenly believed that they had taken the firearm from him during the raid. Thus, under the circumstances of this case, including defendant's defense theory, the court did not err in failing to define the term "firearm."

The instructions fairly presented the issues to be tried and did not exclude any material facts, defense, or theories.[1] *Canales, supra* at 574.

Further, we reject defendant's argument that the jury's first note, which inquired whether a ballistics report existed, indicated that the jury needed to have the word firearm defined. Again, the only defense theory regarding the firearm was defendant's aforementioned denial that it was taken from him. Regardless, the trial court correctly observed that the jury's note did not suggest that it needed the word firearm defined, but simply inquired about the existence of a ballistics report. Accordingly, the trial court's instructions in response to the jury's first note fairly presented the issues and sufficiently protected defendant's rights. *Aldrich, supra* at 124.

Next, defendant contends that there was insufficient evidence presented on the element of possession to support his controlled substance convictions. A challenge to the sufficiency of the evidence requires us to determine "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). Circumstantial evidence, and reasonable inferences arising from it, may be sufficient to prove the elements of a crime. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

"Possession may either be actual or constructive." *People v Wolfe*, 440 Mich 508, 520: 489 NW2d 478 (1992).[2] "[P]ossession may be proved by circumstantial evidence and reasonable inferences drawn from this evidence." *People v Maliskey*, 77 Mich App 444, 453; 258 NW2d 512 (1977). "[P]osession may be found even when the defendant is not the owner of" the recovered drug. *Wolfe, supra* at 520. However, "[i]t is well established that a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown." *Id.* Here, defendant's testimony suggested that he had purchased cocaine, but not yet taken actual possession of it at the time of the raid. The instant matter is, therefore, distinguishable from cases where a defendant is found merely in proximity to drugs. See *People v Lewis*, 178 Mich App 464; 444 NW2d 194 (1989). Viewing this evidence in a light most favorable to the prosecution, there was sufficient evidence establishing that defendant was in constructive possession of the cocaine. *Nowack, supra* at 399.

In addition, a police officer testified that he observed defendant selling what appeared to be illegal drugs out of either part of a brown paper bag or a brown piece of paper. Another officer testified that heroin and cocaine were found on two pieces of "brown curled up paper" that was on a coffee table in front of four individuals (including defendant). Viewing this

[1] Given that defendant did not present any evidence or theory that would require the trial court to define "firearm," we reject defendant's contention that trial counsel was somehow deficient in failing to request a definition. Indeed, a successful claim of ineffective assistance of counsel requires a defendant to "show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000).

[2] Amended on other grounds 441 Mich 1201 (1992).

evidence in a light most favorable to the prosecution, there was sufficient circumstantial evidence for the jury to find that defendant actually possessed the heroin. *Nowack, supra* at 399; *Avant, supra* at 505.

Alternatively, the jury may have found that defendant aided and abetted in the possession of the heroin and cocaine by making at least one transaction that involved one of the two drugs confiscated during the raid. In *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (2000), we explained:

> One who procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if he committed the offense directly. MCL 767.39 . . . . To establish that a defendant aided and abetted a crime, the prosecutor must prove that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the principal in committing the crime, and (3) the defendant intended the commission of the crime or knew the principal intended its commission at the time he gave aid or encouragement.

Here, there was ample testimony indicating that someone possessed both heroin and cocaine. The police officer who testified that he observed defendant make one transaction also testified that he observed two other individuals make three additional transactions during a twenty-five minute period. Thus, there was evidence suggesting that someone possessed both cocaine and heroin, and that defendant assisted that possessor by selling one of the two drugs. In fact, this evidence was sufficient to support convictions of two counts of possession with intent to deliver, whereas defendant was convicted of the lesser-included offenses of merely possessing the drugs. *Nowack, supra* at 399. Accordingly, defendant's challenge to the sufficiency of the evidence supporting his possession convictions is without merit. *Id.*

We note that defendant's judgment of sentence erroneously indicates that he was convicted of two counts of possession with intent to deliver, MCL 333.7401(2)(a)(iv), rather than mere possession, MCL 333.7403(2)(a)(iv). Therefore, we remand for the correction of defendant's judgment of sentence.

Affirmed as to defendant's substantive issues, but remanded for correction of defendant's judgment of sentence. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Richard Allen Griffin
/s/ Bill Schuette